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Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement

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LEFT OUT IN THE COLD: TRAFFICKING VICTIMS,
GENDER, AND MISINTERPRETATION OF THE
REFUGEE CONVENTION'S
“NEXUS” REQUIREMENT

*Martina Pomeroy**

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INTRODUCTION

Victims of human trafficking¹ who seek international protection in their country of destination face a steep uphill battle. Special visa programs designed to regularize their status are often riddled with conditions that make them inaccessible to all but a very few victims. Despite widespread international agreement that the manifold harms inflicted upon the majority of trafficked persons generally rise to the level of persecution, and therefore that victims should be eligible to apply for asylum, many national courts misinterpret international refugee law standards and routinely deny refugee status to deserving applicants. Courts often refuse to recognize persecution on the basis of gender, whereas the vast majority of trafficking victims are targeted because they are female. The result is that many trafficking victims who substantively meet the requirements for refugee status, and are therefore deserving of international protection in the form of asylum, instead find themselves prosecuted and deported. Adjudicators justify their denials on the ground that trafficking victims fail to meet the so-called “nexus” requirement, which obliges an asylum seeker to establish that her persecution was *for reasons of* her civil or political status—a requirement that becomes difficult to establish in the context of trafficking.

I. TRAFFICKING: DEFINITION AND CONTEXT

According to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, also known as the Palermo Protocol [hereinafter, “Palermo Protocol”], adopted by the United Nations in 2000, “trafficking in persons” is defined as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”² The act of trafficking is thus distinguished

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1. Given that persons who fear being trafficked as well as persons already trafficked may be considered “victims of trafficking” I refer to both of those groups when I use the term.
 2. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *supplementing* the United Nations Convention Against Transnational Organized Crime, art. 3(a), G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), (Sept. 9, 2003), *available at*

from smuggling by virtue of the fact that a trafficked person remains under the control of the trafficker even after arrival in the destination country, while a smuggler simply facilitates transit to the destination country.³

As the issue of trafficking has started receiving media attention in recent years, the emerging stories of trafficked women and girls resonate with the same elements: being deceived into crossing a border under a promise of a job, being brutally initiated into slavery (usually of a sexual form), a life of confinement, fear, and desperation.⁴ One survivor of trafficking, who managed to escape from a brothel in the United Kingdom, described a very common experience among trafficked women:

I come from a very poor area of Ukraine. I went to Moldova with a friend who said he could help me get work, but he sold me to some Albanians. They locked me in their house, raped me and beat me regularly. I was taken to the UK, to a massage parlour in Sheffield, where I was forced to see up to 15 clients a day but could not keep any of the money. The men visited my mother and told her that if I returned home they would kill me.⁵

Trafficking is manifestly a facet of the trend in migration from the global "south" to the global "north," which is generally motivated by the severe inequalities and lack of basic human rights that plague most of

http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf [hereinafter Palermo Protocol].

3. See, e.g., U.S. DEP'T OF STATE, THE HUMAN SMUGGLING AND TRAFFICKING CENTER, FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING, (Jan. 2005) available at <http://www.state.gov/m/ds/hstcenter/90434.htm> ("[u]nlike smuggling, which is often a criminal commercial transaction between two willing parties who go their separate ways once their business is complete, trafficking specifically targets the trafficked person as an object of criminal exploitation. The purpose from the beginning of the trafficking enterprise is to profit from the exploitation of the victim.") See also Canadian Council for Refugees, About Trafficking, <http://www.ccrweb.ca/trafficking/learn.htm>.
4. See U.S. Department of State Office to Monitor and Combat Trafficking in Persons, Victim Stories, <http://www.state.gov/g/tip/c16482.htm>.
5. Cahal Milmo and Nigel Morris, *18,000 Women and Children Trafficked into UK Sex Trade*, THE INDEPENDENT, Jul. 3, 2008, available at <http://www.independent.co.uk/news/uk/crime/18000-women-and-children-trafficked-into-uk-sex-trade-859106.html>; see also, Catholic Relief Services, Human Trafficking: An Overview, http://crs.org/public-policy/in_depth.cfm (stating that "[t]rafficking is one of the most horrific end results of economic and social disparities that increase the vulnerability of millions of people.").

the world's population, especially gender-based discrimination.⁶ The growing disparity between rich and poor countries only increases the pressure on the world's poor to migrate in search of a better life, as well as the demand in rich countries for cheap, exploitable labor.⁷ Yet the channels for legal migration are increasingly closing up,⁸ presenting a golden opportunity for organized crime to step in and fill the gap. "Women and girls are particularly vulnerable to being caught in the middle of these conflicting pressures, because of gendered social, economic, cultural and political systems";⁹ in fact, adoption of "[m]ore restrictive immigration laws . . . may actually provide greater opportunities for traffickers."¹⁰

Victims of human trafficking are thus caught between the efforts of the world's richer governments to tighten their borders (just as their populations demand cheaper and cheaper labor) and the increasing desperation of the world's poor to seek opportunities for greater personal advancement. Yet, such individuals are generally deemed ineligible for refugee status: "[a]lthough both refugees and trafficked women may have minimal control over their choice to travel to [their destination country], as a group they are subject to detention, stigmatization and possible expulsion because they have broken [the] border laws [of their country of asylum]."¹¹ "Governments around the world treat victims of trafficking as undocumented migrants, criminals, or both,"¹² rather than offering them the protection they need and are entitled to under human rights norms.

The refugee protection regime established by the 1951 Convention Relating to the Status of Refugees (hereinafter, "Refugee Convention"), signed onto by the vast majority of states,¹³ has been analogized to the

6. GLOBAL TRAFFICKING IN WOMEN AND CHILDREN 111–12 (Obi N. I. Ebbe & Dilip K. Das eds., 2008); see also Pamela Stowers Johansen, *Human Trafficking, Illegal Immigrants and HIV/AIDS: Personal Rights, Public Protection*, 4 CAL. J. OF HEALTH PROMOTION 34, 36 (2006).

7. Johansen, *supra* note 6.

8. Canadian Council for Refugees, *supra* note 3.

9. *Id.*

10. Johansen, *supra* note 6, at 38.

11. Georgina Costello, Refugee Team, Amnesty Int'l, *Jammed: Trafficked Women in Australia*, Presentation at the Stop the Traffic Symposium (Feb. 25, 2002), in 16 KASAMA (Solidarity Phil. Austl. Network, Queensl., Austl.), Apr.–June 2002, available at <http://cpcabrisbane.org/Kasama/2002/V16n2/Jammed.htm>.

12. Press Release, Human Rights Watch, U.S. State Dep't Trafficking Report a "Mixed Bag" (July 12, 2001) [hereinafter Mixed Bag].

13. U.N. High Comm'r for Refugees, *Signatories to the Refugee Convention as of October 1, 2008*, available at <http://www.unhcr.org/3b73b0d63.html> (noting the number of signatory states to be 144, out of 192 members of the United Nations).

small opening in a dam that allows a few, “deserving” individuals to pass through in order to prevent the entire dam of border control from bursting.¹⁴ As such, the refugee status determination process is very restrictive: the criteria for obtaining recognition as a refugee under the Refugee Convention are not easily met, and become even more difficult to satisfy under the various interpretations of the world’s courts. Conversely, trafficking is a direct result of the “growing restrictions against legal and safe migration that people around the world are facing.”¹⁵

II. THE LAW ENFORCEMENT APPROACH

In 2000, the United Nations introduced the Palermo Protocol as an effort to address universally, for the first time, “all aspects of trafficking in persons.”¹⁶ This document is referred to as a “protocol” because it is not a treaty in its own right, but rather an addendum to the United Nations Convention Against Transnational Organized Crime.¹⁷ Its attachment to this treaty reveals the perception of the governments responsible for negotiating the Palermo Protocol that trafficking is above all an issue of crime, and its substantive provisions delineate a largely law-enforcement response to human trafficking.¹⁸ The overall “focus [of the document] . . . is on criminalizing the traffickers.”¹⁹ The negotiating governments did include some provisions intended to protect the victims of trafficking, but adherence to those provisions is not mandatory, and is further restricted by states’ domestic laws.²⁰ On that basis, the

14. See James C. Hathaway, *THE LAW OF REFUGEE STATUS* 2 (1991) (“[r]efugee law was designed to effect a compromise between the reality of [the] largely unstoppable flow of involuntary migrants . . . and the broader policy commitment to restrictionism in immigration. At least in its initial form, refugee law constituted a humanitarian exception to the protectionist norm . . .”).

15. Canadian Council for Refugees, *supra* note 3.

16. Palermo Protocol, *supra* note 2, at pmb1.

17. *Id.* at art. 1, ¶ 1.

18. Canadian Council for Refugees, *supra* note 3.

19. *Id.*; see also Audrey Macklin, *At the Border of Rights: Migration, Sex Work, and Trafficking*, in *FROM THE MARGINS OF GLOBALIZATION: CRITICAL PERSPECTIVES ON HUMAN RIGHTS* 161, 186 (Neve Gordon ed., 2004) (arguing that “[t]he Protocol’s status as an annex to a convention about transnational organized crime evinces the primacy of the state as victim of organized criminals’ assault on state sovereignty and security” and that the “victim status [of trafficked women] is subordinate to the victimization of the state by organized criminals.”).

20. See Palermo Protocol, *supra* note 2, at art. 6(1); Anne Gallagher, *Trafficking, Smuggling and Human Rights: Tricks and Treaties*, 12 *FORCED MIGRATION REV.* 25, 26 (2002), available at <http://www.fmreview.org/FMRpdfs/FMR12/fmr12.9.pdf> [hereinafter Gallagher].

agreement has been criticized for failing to treat the issue of trafficking as one of migrants' rights rather than one of law enforcement, and for its failure to acknowledge the responsibility of states in maintaining conditions in which trafficking flourishes.²¹ Specifically, the treaty does *not* require states to regularize the immigration status of trafficking victims who are transported into their borders, but merely obliges states to *consider* measures that would allow victims to remain "*in appropriate cases.*"²²

A. Special Visa Programs

The law enforcement approach to human trafficking can in fact function as an "extension of states' efforts to curb migration," as most anti-trafficking regimes involve returning the victims of trafficking to their countries of origin, despite the fact that they may have had "compelling reasons to leave"²³ or may be at risk of further harms upon return. Some countries, like the United States, have introduced immigration regimes that permit victims of trafficking to regularize their status in the destination country.²⁴ However, such programs frequently condition access to benefits on the victim's agreement to cooperate in the prosecution of, or even to testify against, her trafficker—despite the fact that the Palermo Protocol's protections in no way distinguish between victims who act as witnesses and those who don't.²⁵ As a consequence of cooperating with authorities, a victim may legitimately fear that she could be putting herself, or her family, in danger of retaliation by her traffickers.²⁶ Additionally, even where victims do assist law enforcement, "the process of applying for benefits and protections can

21. Gallagher, *supra* note 20 at 25 (noting that "in many cases, and particularly on the part of the major destination countries, attempts to counter trafficking and smuggling seem to be motivated by a growing intolerance of all forms of irregular migration").

22. Palermo Protocol, *supra* note 2, at art. 7; *see also* Mohamed Mattar, Executive Director, The Protection Project at The Johns Hopkins Univ., speech at The Vienna Forum to Combat Human Trafficking, Vienna, Austria, (Feb. 15, 2008) (transcript available at <http://www.protectionproject.org/news/The%20Vienna%20Forum%20to%20Combat%20Human%20Trafficking>).

23. Canadian Council for Refugees, *supra* note 3.

24. *See, e.g.*, Press Release, U.S. Dep't. of Justice, Department of Justice Issues T Visa to Protect Women, Children, and All Victims of Human Trafficking (Jan. 24, 2002), http://www.usdoj.gov/opa/pr/2002/January/02_crt_038.htm.

25. *See* Stop Violence Against Women, Victim Protection and Immigration Law, http://www.stopvaw.org/Victim_Protection_and_Immigration_Law.html (last visited Jan. 7, 2010); *see generally* Palermo Protocol, *supra* note 2, at art. 6.

26. *See, e.g.*, Costello, *supra* note 11.

be very long, stressful, and potentially risky. . . . victims may be charged with crimes, including prostitution, and face incarceration or deportation.”²⁷ Finally, such programs may provide only temporary status, for example for the duration of court proceedings, leaving a victim unprotected once her role in the prosecution has come to an end.²⁸

The United States’ “T-Visa” program, established in the Trafficking Victims Protection Act of 2000 (hereinafter, the “TVPA”), authorizes the Department of Homeland Security to grant status equivalent to asylum and other benefits *only* to victims of *severe forms* of trafficking,²⁹ who by definition must either be under the age of eighteen, or have been trafficked using force, fraud, or coercion. Thus, successfully obtaining a T-visa appears all the more difficult when taking into account that “[m]ost victims of trafficking are lured, enticed, or deceived into servitude.”³⁰ Moreover, by the time law enforcement intervenes, the victim has been abused, threatened, and traumatized to such a degree that “no locks, chains or guns are needed” anymore to maintain the victim in her state of servitude, making it difficult for her to claim she was there against her will.³¹ A further hurdle is the TVPA’s requirement that adult victims cooperate with authorities’ “reasonable requests” to assist in the investigation and prosecution of those involved in their trafficking.³² The abuse a trafficked victim has endured will also likely have rendered her too terrified of her traffickers to feel capable of cooperating with law enforcement.³³

27. Johansen, *supra* note 6, at 37 (referring specifically to the United States system).

28. See Mattar, *supra* note 22.

29. Trafficking Victims Protection Act of 2000, § 107(B)(1)(A), *as amended by* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (December 19, 2003), *available at* <http://www.state.gov/documents/organization/10492.pdf> (hereinafter TVPA); *see generally id.* at § 103(8) (defining “severe forms of trafficking” as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained eighteen years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”).

30. Taina Bien-Aime, *Protecting Pimps and Traffickers*, THE HUFFINGTON POST, July 15, 2008, http://www.huffingtonpost.com/taina-bienaime/protecting-pimps-and-traf_b_112929.html; *see also*, Equality Now, Trafficking Victims Protection Reauthorization Act, July 2008, http://www.equalitynow.org/english/campaigns/sex-tourism-trafficking/tvpa/tvpa_en.html (last visited July 19, 2008).

31. *Id.*

32. TVPA at § 103(8); *see also* Stop Violence Against Women, *supra* note 25.

33. Anna Gorman, *Program to Fight Human Trafficking Is Underused*, L.A. TIMES, Dec. 19, 2005, at B1.

As of July 2008, only seventy trafficking cases have been successfully prosecuted under the TVPA since its passage eight years ago.³⁴ Between 2001 and 2005, “only 752 trafficking victims applied [for T visas],” and only 491 actually received them.³⁵ Furthermore, the U.S. Department of Justice press release announcing the creation of the T-Visa program estimated the number of victims in the United States trapped in “modern-day, slavery-like situations like forced prostitution” at 45,000-50,000,³⁶ and the TVPA itself estimates the number of women and children trafficked into the United States *every year* at 50,000³⁷; yet the statute caps the total number of T visas that can be distributed to trafficking victims each year at only 5,000.³⁸

Canada’s Immigration and Refugee Protection Act provides that trafficking victims may apply for refugee or permanent resident status,³⁹ but a troubling qualification bars victims who have been prosecuted, say, for prostitution or illegal entry, from access to this protection.⁴⁰ The UN Office on Drugs and Crime estimates that 79% of trafficking is for the purpose of sexual exploitation,⁴¹ which usually means forced “prostitution.” A trafficked woman forced to work in a brothel would be no less in need of protection in the form of asylum had she previously been arrested for prostitution. Such a provision subverts the Palermo Protocol’s aim of protecting those who are coerced or deceived into slavery.

Canada’s legislation also does not include protection measures for trafficking victims; in fact, the only provision in which trafficking victims are mentioned states that having been trafficked is a factor *favoring* detention.⁴² Following on the heels of the United States, the Canadian government in May 2006 enacted guidelines that can give victims of trafficking access to temporary residence permits as an emergency protection measure. However, as the Canadian Council for Refugees points out, such permits are issued on a discretionary basis,⁴³ and that, coupled

34. Equality Now, *supra* note 30.

35. Johansen, *supra* note 6, at 37.

36. U.S. Dep’t of Justice, *supra* note 24.

37. TVPA, *supra* note 29, at § 102(b)(1).

38. *Id.* at § 107(e)(2)(B)(2).

39. Donna E. Stewart & Olga Gajic-Veljanoski, *Trafficking in Women: The Canadian Perspective*, 173 CAN. MED. ASS’N. J. 25, 26 (2005), available at <http://www.cmaj.ca/cgi/reprint/173/1/25>.

40. *Id.*

41. U. N. Office on Drugs and Crime, *Global Report on Trafficking in Persons*, 6 (Feb. 2009), available at http://www.unodc.org/documents/Global_Report_on_TIP.pdf.

42. Canadian Council for Refugees, *supra* note 3.

43. *Id.*

with the high burden of proof placed on the refugee,⁴⁴ makes the regime inadequate.⁴⁵

Furthermore, Canada's trafficking victim protection system requires the involvement of law enforcement agencies,⁴⁶ which is a natural, and huge, deterrent for victims of trafficking.⁴⁷ Victims may fear deportation, arrest and prosecution for any illegal activities they may have been forced into (such as prostitution and drug use) if they seek out protection. In 2007, one year after the temporary residence permit regime came into force, Canadian authorities interviewed a woman apprehended at the border, concluded that she had been trafficked, and yet failed to offer her any protection.⁴⁸ CCR reports that "instead, she was held in detention and quickly deported, without even being given the opportunity to meet with a lawyer."⁴⁹

In Australia, when confronted with a proposal to provide victims of human trafficking with regularized immigration status in exchange for cooperating with prosecutors against their traffickers, the Minister for Immigration, Phillip Ruddock, posited that the system could be abused by people who "would claim to be prostitutes who fear going home," and asserted that in any case, most genuine victims of trafficking would not "provide [law enforcement] with the level of co-operation that will get prosecutions [because] they are afraid of reprisals."⁵⁰ Thus, a protection regime for trafficking victims is worthwhile only if it can be expected to generate law enforcement benefits.

Australia eventually followed suit and adopted a special visa program which, like the U.S. T-Visa program, conditions access on the victim's agreement to cooperate with prosecutors.⁵¹ Additionally, the visa extends only so long as is "required for law enforcement purposes."⁵²

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Adele Horin, *Wrong to Treat Sex Slaves as Illegal Immigrants, Says Human Rights Campaigner*, SYDNEY MORNING HERALD, Feb. 19, 2002, at 6.

51. Migration Amendment Regulations, 2003, No. 11, sched. 8 (Austl.) (Amendments relating to Witness Protection visas), (*amending* Migration Regulations, 1994 (Austl.)); *see also* Anna Dorevitch & Michelle Foster, *Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law*, 9 MELBOURNE J. INT'L L. 1, 10 (2008), *available at* [http://www.mjil.law.unimelb.edu.au/issues/archive/2008\(1\)/01Foster.pdf](http://www.mjil.law.unimelb.edu.au/issues/archive/2008(1)/01Foster.pdf).

52. Dorevitch & Foster, *supra* note 51, at 11 (quoting Jennifer Burn & Frances Simmons, *Trafficking and Slavery in Australia: An Evaluation of Victim Support Strategies*, 15 ASIAN AND PAC. MIGRATION J. 553, 561 (2006)).

Several countries in Europe, including Belgium and the Netherlands,⁵³ have also introduced legislation providing for a specific visa for victims of trafficking.⁵⁴ Japan, which faced severe criticism for failing to adequately “comply with the minimum standards for the elimination of trafficking” in the recent United States Department of State Trafficking in Persons Report,⁵⁵ revised its Immigration Act to endow the Justice Minister with discretion to provide individual victims of trafficking with temporary residence status in return for which they are expected to cooperate with authorities in trafficking investigations.⁵⁶

The introduction of special visas for trafficking victims is “[i]n keeping with the spirit of the Palermo trafficking protocol,”⁵⁷ Article 9 of which obliges states to protect individuals who have been trafficked into their countries from being re-victimized,⁵⁸ but remains an inadequate durable solution for the vast majority of trafficked persons—as evidenced by the extremely low numbers of persons who have actually succeeded in obtaining such visas.

III. REFUGEE STATUS: A VICTIM’S ONLY MEANINGFUL OPPORTUNITY FOR PROTECTION

Trafficking victims transported outside their country of nationality are generally accepted as eligible to apply for asylum⁵⁹ because unlike persons who are smuggled, those who are “trafficked” have by definition been deceived or coerced into an exploitative situation, and as such fall outside the category of illegal migrants.⁶⁰ Although the vast majority of

53. Mattar, *supra* note 22.

54. Costello, *supra* note 11.

55. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (2004), *available at* <http://www.state.gov/documents/organization/33614.pdf>.

56. Nobuki Fujimoto, *Trafficking in Persons and the Filipino Entertainers in Japan*, 43 FOCUS ASIA-PACIFIC (HURIGHTS OSAKA, Osaka, Japan), Mar. 2006, at 7, 7–8, *available at* <http://www.hurights.or.jp/asia-pacific/043/focus43.pdf>.

57. Costello, *supra* note 11.

58. Palermo Protocol, *supra* note 2, at art. 9(1)(b).

59. U.N. High Comm’r for Refugees, *Guidelines on Int’l Prot.: The App. of Art. 1A(2) of the 1951 Convent. &/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking & Pers. at Risk of Being Trafficked*, ¶ 12, HCR/GIP/06/07 (Apr. 7, 2006), *available at* <http://www.unhcr.org.au/pdfs/IOMtraffickingvictims.pdf> [hereinafter UNHCR Trafficking Guidelines]; *European Conf. on Preventing & Combating Trafficking in Human Beings*, Brussels, Belg., Sept. 18–20, 2002, *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*, Annex ¶ 13, 2003 O.J. (C 137), *available at* http://www.coe.int/t/dg2/trafficking/campaign/Docs/OrOrg/Bruxdoc_en.pdf [hereinafter Brussels Declaration].

60. Palermo Protocol, *supra* note 2, at art. 3.

trafficking victims are women and girls forced into prostitution, many women, girls, men, and boys are trafficked to serve in other forms of forced labor.⁶¹ As a result of the participation of the United Nations High Commissioner for Refugees (hereinafter, the “UNHCR”) in the drafting of the Palermo Protocol, the latest international trafficking instrument, that agreement contains an explicit statement that “[n]othing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”⁶² This “saving clause” had met significant resistance from negotiating governments, because it would prevent them from being able to eliminate from the rolls of asylum seekers those who entered their borders illegally, albeit as trafficking victims.⁶³ The UNHCR’s Guidelines on International Protection for Victims of Trafficking (hereinafter, the “UNHCR Trafficking Guidelines”) reaffirm that actual and potential victims of trafficking may qualify for refugee status, provided they meet the requirements of the Refugee Convention—like anyone else.⁶⁴

While both documents emphasize the principle that having been trafficked should not reduce one’s chances of obtaining refugee status in a country of asylum, the UNHCR Trafficking Guidelines walk through the elements of the refugee definition in the context of the situation in which most trafficking victims find themselves.⁶⁵ This analysis serves as a useful guide for adjudicators in determining whether the types of harms experienced by, or feared by, an applicant for refugee status could rise to the level of persecution, and whether the state in the applicant’s country of origin is tolerant or complicit enough in the practice of trafficking for international protection to be necessary.

A. Absence of ‘Gender’ as a Ground for Persecution

While acknowledging that trafficking victims are overwhelmingly female and are transported for purposes of sexual exploitation,⁶⁶ the UNHCR Trafficking Guidelines do not make clear how these facts can be successfully aligned with the Refugee Convention, which fails to

61. UNHCR Trafficking Guidelines, *supra* note 59, at ¶ 3.

62. Palermo Protocol, *supra* note 2, at art. 14.

63. See Gallagher, *supra* note 20, at 27.

64. UNHCR Trafficking Guidelines, *supra* note 59, at ¶¶ 5–6.

65. See *id.* at ¶¶ 7–33.

66. UNHCR Trafficking Guidelines, *supra* note 59, at ¶ 3.

account explicitly for gender-related harms as a basis for refugee status. Rather, the Convention focuses on five specific “grounds”: persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group.⁶⁷ While UNHCR’s Executive Committee, which directs the agency’s policies, has promulgated directives on the question of gender-related persecution, it merely affirmed that states are *permitted* to take gender into account when considering refugee status,⁶⁸ and that sexual violence may be a form of persecution.⁶⁹

The Refugee Convention defines a refugee as a person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his [or her] nationality and is unable, or owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.”⁷⁰ In other words, the claimant must have escaped her country of persecution. While this might not be an easy requirement to meet, especially for those persons who are at risk of being trafficked or who have been trafficked internally, they do not face a higher burden than most other refugees. Trafficking victims are in a unique situation vis-à-vis many asylum applicants, however, in that generally their persecution arises only *after* they have left their country of origin—making them refugees *sur place*.⁷¹ Their departure from their country of origin for reasons other than persecution does not impede their claim to refugee status under the Convention if, since having left, they now face persecution upon returning home. This is a likely scenario for many trafficked persons, who may develop a fear of returning to their country of origin as a result of having been trafficked—for example, fearing the risk of being re-trafficked or of reprisals by the traffickers they originally

67. Convention Relating to the Status of Refugees, art. 1.A(2), July 28, 1951, 189 U.N.T.S. 150 (Apr. 22, 1954), *as amended by* the 1967 Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 [hereinafter the Refugee Convention].

68. See U.N. High Comm’r for Refugees, Executive Committee Conclusion No.39, *Refugee Women and International Protection*, ¶ k, U.N. Doc. HCR/IP/2/Rev. 1986 (July 8, 1985) [hereinafter UNHCR Conclusion No. 39].

69. See U.N. High Comm’r for Refugees, Executive Committee Conclusion No.73, *Refugee Protection and Sexual Violence*, ¶ d, U.N. Doc. No. 73 (XLIV) - 1993 (Oct. 8, 1993).

70. Refugee Convention, *supra* note 67, at art. 1.A(2).

71. U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶¶ 94–96, HCR/IP/4/Eng/REV. 1 (Jan. 1992), available at www.unhcr.org/publ/PUBL/3d58e13b4.pdf [hereinafter UNHCR Handbook] (stating that a refugee need not have left her country of origin because of a well-founded fear of persecution where a well-founded fear of persecution in her country of origin arose *after* her arrival in her country of asylum).

escaped from.⁷² The UNHCR has recognized that trafficking victims may be refugees given that they “may face serious repercussions after their escape and/or upon their return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination.”⁷³

The trafficking victim must further demonstrate that she has a “well-founded fear of persecution” in her country of origin.⁷⁴ Given the abundant documentation by governments, intergovernmental organizations, and human rights groups concerning the nature of human trafficking throughout the world,⁷⁵ it is now accepted that many of the acts inherent in trafficking, including such “forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment . . . constitute serious violations of human rights which will generally amount to persecution.”⁷⁶ However, for refugee status to inhere in a trafficked person, she must have a well-founded fear that she is at risk of such acts occurring in her country of origin, not in the country she was trafficked to—and is thus too fearful to go back home.

72. U.N. High Comm’r for Refugees, *Refugee Protection and International Migration* ¶ 5, (Jan. 17, 2007), available at <http://www.unhcr.org/refworld/pdfid/462f6d982.pdf>.

73. U.N. High Comm’r for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 18, U.N. Doc. HCR/GIP/02/01, (May 7, 2002), available at <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf> [hereinafter UNHCR Gender Guidelines].

74. *Id.* at ¶ 9.

75. See, e.g., U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2008), available at <http://www.state.gov/g/drl/hr/c1470.htm>; U.N. SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS ASPECTS OF THE VICTIMS OF TRAFFICKING IN PERSONS, ANNUAL REPORTS 2007–2009, available at <http://www2.ohchr.org/english/issues/trafficking/annual.htm>; HumanTrafficking.org Newsletters (2005–2007), <http://www.humantrafficking.org/newsletters/archive>.

76. UNHCR Trafficking Guidelines, *supra* note 59, at ¶ 15; but see *SZBFQ v. Minister of Immigration*, No. FMCA 197 (June 10, 2005), <http://cgrs.uchastings.edu/law/search.php> (holding in case concerning trafficking in Azerbaijan that whether forced prostitution trafficking could amount to persecution of women was an open question). For a very clear analysis of how trafficking victims meet the well-founded fear of persecution requirement of the Refugee Convention, see Calvin C. Cheung, *Protecting Sex Trafficking Victims: Establishing The Persecution Element*, 14 ASIAN AM. L. J. 31 (2007).

B. Grounds for Refugee Status Under the Refugee Convention

The persecution feared by the victim must be linked to one of the categories listed in the Convention: her race, religion, nationality, political opinion, or membership in a particular social group.⁷⁷ This prong of the Refugee Convention definition can cause difficulty for trafficking victims who seek asylum, because it usually is not the case that they were trafficked because of a listed Convention ground. There are indications that race or ethnicity may in fact play a large role in the demand for prostitutes, and thus link directly to which groups are targeted to be trafficked for sexual exploitation.⁷⁸ However, given the sheer numbers of women of all races who are trafficked annually, it will be difficult to show that race played a meaningful part in why a particular individual was trafficked.

Thus, in refugee status claims by trafficked persons, the fifth Convention prong—"particular social group"—is most commonly the ground relied upon. Such reliance may prove problematic, however, as UNHCR and leading high court cases have held that the "group" in question may not be unified only by the persecution faced,⁷⁹ because "defining a social group by reference to the particular harm feared is circular."⁸⁰ Rather, the group must be defined by an innate or unchangeable characteristic, a characteristic that is so fundamental to one's being that it should not have to be changed in order for persecution to be avoided, or a characteristic that sets the group apart in the perception of society.⁸¹ Victims of past trafficking, for example, have prevailed on claims of membership in the particular social group of traf-

77. Refugee Convention, *supra* note 67, at art. 1(A)(2).

78. World Conference Against Racism, Press Kit Information Sheet, The Race Dimensions of Trafficking in Persons—Especially Women and Children, *available at* <http://www.un.org/WCAR/e-kit/issues.htm>.

79. U.N. High. Comm'r for Refugees, *Guidelines on International Protection: Membership of a Particular Social Group, Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 2, U.N. Doc. HCR/GIP/02/02, (May 7, 2002), *available at* <http://www.unhcr.org/publ/PUBL/3d58de2da.pdf> [hereinafter UNHCR Social Group Guidelines] (noting that "a social group cannot be defined exclusively by the fact that it is targeted for persecution"). *See, e.g.*, Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another (1997) 190 C.L.R. 225 (Austl.) (noting that "[P]erspectutory conduct cannot define the social group"); Ward v. Canada, [1993] 2 S.C.R. 689 (Can.).

80. Elizabeth Adjin-Tettey, *Defining a Particular Social Group Based on Gender*, REFUGE, Oct. 1997, at 22, 23 (Can.), *available at* <http://pi.library.yorku.ca/ojs/index.php/refuge/article/viewFile/21931/20600>.

81. UNHCR Social Group Guidelines, *supra* note 79, at ¶¶ 6–7.

ficked women who escaped from their traffickers, each element of which qualifies as an unchangeable status.⁸²

C. 'Women' as a Particular Social Group

Women who flee their country of origin out of a well-founded fear of being trafficked could lodge their asylum claims simply as "women," given that UNHCR⁸³ and some jurisdictions⁸⁴ have recognized gender at the least as a *factor* for refugee status. But in most courts the class of "women" is not straightforwardly accepted, in and of itself, as constituting a particular social group, so female victims must craft a narrower category based on distinctive characteristics that unite them with other women who face trafficking, such as being single,⁸⁵ attractive,⁸⁶ educated,⁸⁷ or orphaned as a child⁸⁸—which may not always succeed. Men who risk being trafficked could also base their claim on their gender,⁸⁹ but are more likely to prevail by defining a narrower group based, for example, on their socio-economic class or family status, or by relying on the other Convention grounds.

Per the UNHCR Executive Committee's conclusion cited above, gender may enter into the refugee criteria through the "particular social group" category. Like race, nationality, and other characteristics that courts have identified as so "fundamental" to one's being that they are either unchangeable, or cannot be required to be changed consistently with an adherence to basic human rights norms,⁹⁰ gender is a characteristic that is either immutable, fundamental, and "frequently treated

82. See *SB v. Sec'y of State for the Home Dep't.* (2008) UKAIT 00002, 1–2, 44; CRDD No. T98-06186, 2 (Immigr. And Refugee Bd., Nov. 2, 1999) (Can.); *Matter of M-J*, Dec. 364 (BIA 2001).

83. UNHCR Gender Guidelines, *supra* note 73, at ¶¶ 2, 6; UNHCR Conclusion No. 39, *supra* note 68, at ¶ k.

84. See, e.g., *Regina v. Immigration Appeal Tribunal*, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.); *MIMA v. Khawar* (2002) 210 C.L.R. 1 (Austl.); *Ward v. Canada* [1993] 2 S.C.R. 689 (Can.).

85. See, e.g., *RRT V00/11003 R.R.T.A.* 929 (Austl.).

86. *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005).

87. [1999] CRDD T99-01434 (Can.) (Case summary in 125 REFLEX (Oct. 27, 1999), available at http://www2.irb-cisr.gc.ca/en/decisions/reflex/index_e.htm?action=issue.view&cid125).

88. *Matter of F-L* (BIA June 3, 2003), case summary No. 216, available at <http://cgrrs.uchastings.edu/law/search.php>.

89. UNHCR Gender Guidelines, *supra* note 73, at ¶ 3.

90. *Dorevitch & Foster*, *supra* note 51, at 28–29.

differently to men.”⁹¹ Professor James Hathaway, Dean of the Melbourne Law School, writes that “[g]ender-based groups are clear examples of social subsets defined by an innate and immutable characteristic . . . [and thus are] properly within the ambit of the social group category.”⁹² Race, nationality, and religion, as Professor Hathaway points out, “are also traits which are shared by large numbers of people,” thus the broadness of the group clearly should not be used as a means of excluding gender from that category by virtue of the *ejusdem generis* principle.⁹³

Rather than focusing on the size or cohesiveness of the group, courts are beginning to recognize that in societies where women as a group are “perceived . . . as inferior,” it is not the form of persecution directed at them in their particular society that defines their group; it is the fact that, as women, they are perceived as inferior, which then invites persecution upon any one of them (though not necessarily all of them).⁹⁴ While no court has yet granted refugee status to a woman by virtue of her membership in the particular social group of women, without additional identifying characteristics,⁹⁵ governments around the world are increasingly recognizing gender-based persecution as a basis for granting asylum.

When the U.S. Justice Department issued its own gender guidelines in 1995—the second government in the world to do so, after Canada⁹⁶—it conducted a review of U.S. asylum jurisprudence specifically relating to gender-based claims and found that “no court had found that a woman had been or would be persecuted on account of her gender” alone.⁹⁷ The guidelines did not address whether gender alone

91. UNHCR Social Group Guidelines, *supra* note 79, at ¶ 12 (finding that “sex can properly be within the ambit of the social group category.”).

92. Hathaway, *supra* note 14, at 162.

93. *Id.* at 163. The *ejusdem generis* principle provides that in a list of specific items followed by general items, the general items should be read as restricted in their scope by the specific items preceding.

94. *See, e.g.* K v. Sec’y of State [2006] UKHL 46, [2007] 1 A.C. 412 (H.L.) (appeal taken from Eng.) (U.K.).

95. U.S. DEP’T OF STATE, GENDER GUIDELINES FOR OVERSEAS REFUGEE PROCESSING (2000), available at http://cgrrs.uchastings.edu/documents/legal/gender_guidelines/US_DOS_Overseas_Gender_Guidelines.pdf (“[T]o date, no court has concluded as a legal matter that an applicant has demonstrated persecution based solely on account of gender. However, where the courts have recognized a gender-related claim, gender has been combined with other characteristics to form the basis of a particular social group.”).

96. Center for Gender and Refugee Studies, Gender Guidelines: United States, http://cgrrs.uchastings.edu/law/gender_guidelines.php (last visited Sept. 9, 2009).

97. Cara Goeller, *Forced Marriage and the Granting of Asylum: A Reason to Hope After Gao v. Gonzalez*, 14 WM. & MARY J. WOMEN & L. 173, 180 (2007) (citing Memorandum

could form the basis of a particular social group, rather instructing adjudicators that “[w]hen considering whether gender might combine with other characteristics to define a particular social group, [adjudicators] should consider whether such additional characteristics are likely to be ascertainable by persecutors.”⁹⁸ However, the guidelines noted two federal cases finding that gender alone could *theoretically* form the basis of a particular social group.⁹⁹

In Australia, the legislation that incorporates the Refugee Convention into domestic law also fails to include gender as a ground of persecution, “which makes it difficult to successfully claim to be a refugee on the basis of suffering gender based persecution . . . lawyers acting for asylum seekers seeking refugee status on the basis of gender persecution must argue that the woman is a member of a particular social group.”¹⁰⁰

Amnesty International initiated a letter-writing campaign on behalf of a trafficking victim in Australia in order to persuade the government to grant her refugee status.¹⁰¹ The trafficked woman, referred to as Christina by Amnesty International, had been transported to Australia by a “Columbian [sic] prostitution syndicate” that she claims told her that “she would be employed as a cleaner.” Instead, Christina was forced into a life of sexual slavery and violence.¹⁰² She managed to escape and applied for refugee status, but was ultimately denied asylum by the Australian Refugee Review Tribunal¹⁰³—four years after Australia had

from Phyllis Coven, Office of Int’l Aff.); U.S. Dep’t of Justice, to All INS Asylum Officers and HQASM Coordinators 13 (May 26, 1995), *available at* http://cgrs.uchastings.edu/law/gender_guidelines.php#US (select the hyperlink entitled “Considerations for Asylum Officers Adjudicating Asylum Claims From Women” under the “Guidelines” heading)).

98. Anne M. Gomez, *The New INS Guidelines on Gender Persecution: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Policies of the People’s Republic of China*, 21 N.C. J. INT’L L. & COM. REG. 621, 641–42 (1996) (quoting Memorandum from Phyllis Coven, Office of Int’l Aff., U.S. Dep’t of Just., to All INS Asylum Officers and HQASM Coordinators 13 (May 26, 1995), *available at* http://cgrs.uchastings.edu/law/gender_guidelines.php#US (select the hyperlink entitled “Considerations for Asylum Officers Adjudicating Asylum Claims From Women” under the “Guidelines” heading)).

99. Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York, Gender-Related Asylum Claims and the Social Group Calculus: Recognizing Women as a Particular Social Group *Per Se*, p. 18, March 27, 2003, *available at* <http://www.abcnyc.org/pdf/report/FINAL%20%20Gender%20Related%20Asylum%20Claims.pdf>.

100. Costello, *supra* note 11.

101. *Id.*

102. *Id.*

103. N98/24000 (2000) RRTA (Austl.).

adopted its own gender guidelines.¹⁰⁴ The tribunal acknowledged that the harms she faced amounted to persecution but determined that she had not been persecuted for membership in a “particular social group.”¹⁰⁵

Christina had based her claim on her membership in the particular social group of young women in Colombia vulnerable to being trafficked; the Tribunal “accepted her evidence that the prostitution syndicate had made threats to kill or injure her or her family if she refused to work as a prostitute in Australia or if she tried to return to Colombia,” but saw her persecution as “individual rather than by virtue of her membership of a particular social group.”¹⁰⁶ The adjudicators were not convinced that “the characteristics of vulnerability, youth and gender, whether considered together or separately, distinguished ‘vulnerable young Colombian women’ or ‘young women’ from the rest of the community as a social group.”¹⁰⁷ This seems to diverge from the Australian Gender Guidelines themselves, which state that women possess “immutable characteristics and shared common social characteristics which may make them cogni[z]able as a group and which may attract persecution.”¹⁰⁸

Thus, one major hurdle facing a trafficking victim is the fact that the refugee definition as enshrined in the Refugee Convention fails to account explicitly for gender-related persecution. It is troubling, in this post-Convention on the Elimination of Discrimination Against Women era, why race is a ground for refugee status in itself, but gender still is not. As seen above, gender is generally not even accepted as a sufficient basis on its own to form a ‘particular social group’—in itself only a roundabout way of bringing gender into the Refugee Convention.

D. Gender-Specific Persecution

Aside from the historical context in which the Refugee Convention was drafted—in the aftermath of World War II when the primary focus of the negotiating states was to ensure protection against the types of

104. DEP’T OF IMMIGRATION AND MULTICULTURAL AFFAIRS OF AUSTRALIA, REFUGEE AND HUMANITARIAN VISA APPLICANTS: GUIDELINES ON GENDER ISSUES FOR DECISION MAKERS (1996), available at http://cgrs.uchastings.edu/documents/legal/guidelines_aust.pdf [hereinafter Australian Gender Guidelines] (directing that gender “may be a significant factor in recognizing a particular social group.”).

105. Costello, *supra* note 11.

106. *Id.*

107. N98/24000 (2000) RRTA (Austl.).

108. Australian Gender Guidelines, *supra* note 104, at 22.

persecution that had characterized that conflict¹⁰⁹—the distinction between private and public harms in law generally is also reflected in refugee law. Forms of persecution that are more public, namely civil and political harms that are more likely to affect men, have traditionally been the focus of refugee protection¹¹⁰—as in human rights in general.¹¹¹ Harms that tend to occur in “private,” namely gender-specific and sexual harms that are more likely to affect women, have traditionally been excluded as bases for refugee status:¹¹² “[t]he traditional image of a refugee is of a male political activist who is persecuted for his political activities against the state.”¹¹³

Yet there is a litany of harms that are specific to women *and* that are grave enough to merit a claim for refugee status:

[W]omen face persecution which is unique to them as the persecution is related to their gender, for example rape and sexual violence, forced sterilisation, genital mutilation and domestic violence, from which women may be unable to get state protection. Women who do not conform to the moral or ethical standards imposed on them may suffer persecution from the state, members of their family and/or community. Women may be targeted because they are particularly vulnerable, for example, those who are young, elderly, disabled or those with caring responsibilities.¹¹⁴

As Catherine Hunter points out, the Refugee Convention “was not intended to distinguish between male and female refugees”—however, as a result of the context in which it was drafted, in practice it has failed to

109. See HATHAWAY, *supra* note 14, at 6–7.

110. See Deidra O'Connor, Contemporary Gender Issues in Refugee Law, Address at the International Association of Refugee Law Judges (Mar. 10, 2000) (transcript available at <http://www.refugee.org.nz/IARLJ3-00OConnor.html>).

111. H. Charlesworth, et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613–45 (1991).

112. O'Connor, *supra* note 110, at ¶ 11.

113. This historical view was explicitly acknowledged by the United Kingdom in its gender asylum guidelines: IMMIGRATION APPELLATE AUTHORITY, ASYLUM GENDER GUIDELINES, Sec. 1.1 (Nov. 2000), available at http://cgrrs.uchastings.edu/documents/legal/gender_guidelines/UK_guidelines.pdf; see also Asylum Aid, Policy Response: Researching Country of Origin Information on Gender and Persecution in the Context of Asylum and Human Rights Claims, May 2007, http://www.asylumaid.org.uk/data/files/publications/48/Eurasil_paper_on_country_of_origin_information_and_gender_May_2007.pdf (last visited July 14, 2008).

114. *Id.*

address these forms of persecution that are gender-specific.¹¹⁵ As a result, in 1995, UNHCR's Executive Committee encouraged states party to the Convention to adopt guidelines recognizing claims by women who face sexual or gender-related persecution.¹¹⁶

E. Prostitution and Trafficking

In the West, where women's equality is at least the officially stated policy, if not the reality on the ground, becoming a prostitute is viewed by the public—however incorrectly in many cases—as an individual choice, and responsibility for that choice rests with the prostitute herself.¹¹⁷ Yet organizations such as the Coalition Against Trafficking in Women doubt whether a woman can even legally consent to be smuggled into another country in order to work as a prostitute, given their position that prostitution is inherently exploitative.¹¹⁸ Under this view, even women who “consent” to be moved across a border in order to work as a prostitute would fall into the category of trafficking rather than smuggling, which is governed by a different international legal regime and in which the smuggled person is not deceived or coerced, but consents to be transported across a border illegally under the terms set by the smuggler.¹¹⁹

115. Catherine Hunter, *Khawar and Migration Legislation Amendment Bill (No 6) 2001: Why Narrowing the Definition of a Refugee Discriminates Against Gender-Related Claims*, 8 AUSTL. J. HUM. RTS. (2002), available at <http://www.austlii.edu.au/au/journals/AJHR/2002/8.html>.

116. U.N. High Comm'r for Refugees, Executive Comm., *General Conclusion on International Protection*, ¶ g (Oct. 20 1995), available at <http://www.unhcr.org/3ae68c438.html> (“In accordance with the principle that women's rights are human rights, [state-promulgated gender] guidelines should recognize as refugees women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or other gender-related persecution.”).

117. See Johansen, *supra* note 6, at 37 (“Although policies are sympathetic to undocumented persons working in the sex industry, cultural stigma against . . . prostitutions are realities for trafficking victims. . .”).

118. Coalition Against Trafficking in Women, <http://www.catwinternational.org/about/index.php> (last visited July 19, 2008) (stating its mission as fighting “sexual exploitation in all its forms, *especially prostitution* and trafficking in women and children.”) (emphasis added).

119. See Protocol Against the Smuggling of Migrants by Land, Sea and Air, *supplementing* the United Nations Convention against Transnational Organized Crime, available at <http://www2.ohchr.org/english/law/organizedcrime.htm>; see also U.S. DEP'T OF JUSTICE, FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING, 2 (Jan. 2005), available at http://www.usdoj.gov/crt/crim/smuggling_trafficking_facts.pdf.

The desperate circumstances of poverty that usually prompt men and women to attempt crossing a border illegally for employment purposes could raise a genuine question of consent: in cases where a person is so vulnerable to abject poverty in her country of origin that she faces a daily choice between, for example, feeding her children or illegally transiting to another country to work, the word "consent" has a hollow ring. Even the U.S. State Department has acknowledged that "[i]t is a vicious myth that women and children who work as prostitutes have voluntarily chosen such a life for themselves."¹²⁰ While allowing for the possibility that one can consent to prostitution, few individuals will voluntarily engage in it "[u]nless compelled by poverty, past trauma, or substance addictions."¹²¹

The view that trafficking victims are somehow responsible for their plight is reflected in the fact that even "developed" countries lack effective laws directly targeted at trafficking or sexual slavery, or did until very recently; some merely have prostitution regulations on the books. For example, an Australian man named Gary Glazner and his associates transported a group of Thai women to Australia to work as "prostitutes."¹²² Upon arrival, the women "were made to work in oppressive conditions . . . required to perform 500 'sexual services' of half an hour before they would receive any financial payment."¹²³ While Mr. Glazner was eventually convicted for operating an unregistered brothel under the country's Prostitution Control Act,

the lack of specific anti-trafficking laws at the time of his case meant that he was not prosecuted for his involvement in trafficking . . . there has not been one prosecution of a trafficker under the Commonwealth sexual slavery laws which were purportedly introduced to address trafficking. Not only has Australia chosen not to sign or ratify the UN Trafficking Protocol, Australia has failed to utilise its own sexual slavery laws: not one prosecution under these laws has taken place and in

120. U.S. DEP'T OF STATE, FACT SHEET: SEX TRAFFICKING, THE UNITED STATES, AND EUROPE, 3 (Jan. 10, 2005), *available at* <http://www.america.gov/st/washfile-english/2005/January/20050106133608cjsamoh4.548281e-02.html>.

121. Donna M. Hughes, The 2002 Trafficking in Persons Report: Lost Opportunity for Progress, Testimony Before the U.S. House Comm. on Int'l Relations (June 19, 2002), *available at* http://www.uri.edu/artsci/wms/hughes/lost_opp.

122. Costello, *supra* note 11.

123. *Id.*

some states . . . equivalent state laws prohibiting state based sexual slavery have not been introduced.¹²⁴

In 2005 Australia introduced offenses related to trafficking in its penal code¹²⁵—an important step forward considering that shortly afterward the UN Office on Drugs and Crime found Australia to be among the world's twenty one “high incidence destination” countries for trafficking.¹²⁶

In many, if not most countries, prostitution may not be a choice, but the sole opportunity for survival that a woman may have:

In many parts of the world societies foster unequal power relations between women and men in public and private. In countries of origin women may experience secondary status to men, experiencing social, cultural, political, economic and legal subordination. A woman may have limited opportunity and means to access protection either in law or where laws exist, in reality. Attention should be given to laws laid out in theory and the reality of a woman being able to access their protection (for example in some countries police may view rape as a private matter and refuse to process complaints).¹²⁷

Under the interpretation of many governments, “women who flee gender-related persecution to a host country such as Australia [face] a real risk of such persecution going unrecognised.”¹²⁸

IV. LACK OF STATE PROTECTION

Because refugee status is designed to provide protection for individuals whose countries of origin have failed to protect them, there is a common misperception that the government itself must be the perpetrator of the harm, and thus that “cultural norms” which are promulgated directly by members of society, and not by the government, cannot form

124. *Id.*

125. Criminal Code Amendment (Trafficking in Persons Offences) Act 2005, NO. 96, 2005 (Austl.)

126. U.N. Office on Drugs and Crime, *Trafficking in Persons: Global Patterns*, 20 (2006), available at <http://www.unodc.org/documents/human-trafficking/HT-globalpatterns-en.pdf>.

127. Asylum Aid, *supra* note 113, at 5–6.

128. Catherine Hunter, *Refugee Case Study: Naima Khawar*, 2002 HUM. RTS. DEFENDER, 18, available at <http://www.austlii.edu.au/au/journals/HRD/2002/18.html>.

the basis for an asylum claim.¹²⁹ The Refugee Convention, however, does not ensure protection only where it is the government itself that has persecuted the applicant; its protection mandate extends to those individuals who were persecuted by private individuals that the government could not or would not stop.¹³⁰ Indeed, under the former interpretation, the vast majority of harms that women as a group tend to face in the world could never give rise to an asylum claim, because the vast majority of harms suffered by women throughout the world are so-called “private” harms that usually are not perpetrated directly by the government, such as rape, domestic violence, and trafficking.

Most trafficking victims are not persecuted by state actors, but rather fall under the category of those “unable or unwilling” to avail themselves of the protection of their own country because the authorities are either complicit in or incapable of controlling what trafficking is taking place there.¹³¹ As Human Rights Watch has pointed out, “[t]rafficking cannot flourish without the involvement of corrupt police, border guards, and state officials.”¹³² In some cases a court has denied asylum to a victim it determined to have a well-founded fear of persecution on the ground that home authorities could offer her adequate protection from her traffickers, despite overwhelming documentary evidence to the contrary.¹³³ Such a ruling should be the exception, not the rule, as the law is clear that if authorities are unable or unwilling to protect a victim from persecution by non-state actors, she is deserving of surrogate protection in the country of refuge.¹³⁴ While many countries, in an attempt to come into compliance with the Palermo Protocol, have superficially established anti-trafficking measures, state officials in source countries are known to systematically turn a blind eye or even to be

129. See, e.g., Dan Stein, *Gender Asylum Reflects Mistaken Priorities*, 3 HUM. RTS. BRIEF 12 (1996), available at <http://www.wcl.american.edu/hrbrief/03/3point.cfm>.

130. See Refugee Convention, *supra* note 67, at art. 1(A)(2) (recognizing as refugees individuals who among other requirements are either “unable . . . or unwilling to avail [themselves] of the protection of [their] country [of nationality]”); UNHCR Trafficking Guidelines, *supra* note 59, at ¶ 21.

131. See, e.g., *Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution*, 14 HUM. RTS. WATCH 69 (Nov. 2002), available at <http://www.hrw.org/legacy/reports/2002/bosnia/Bosnia1102.pdf> [hereinafter *Hopes Betrayed*] (finding that “[w]ithout corrupt officials—both national and international—trafficking cannot flourish.”).

132. Mixed Bag, *supra* note 12.

133. See, e.g., V01/13868, [2002] RRTA 799 (Aus. RRT 6 Sept. 2002).

134. See UNHCR Social Group Guidelines, *supra* note 79, ¶ 21.

intricately involved in trafficking in persons, sometimes as the traffickers themselves.¹³⁵

V. THE "NEXUS" REQUIREMENT

The greatest hurdle for a trafficking victim pursuing an asylum claim is demonstrating that she meets the "nexus" requirement of the Refugee Convention—establishing that she was persecuted *for reasons of* a Convention ground, such as her race or her membership in a particular social group. Most trafficking is carried out by crime rings simply as a way to make money; in fact, trafficking in human beings has recently tied with the illicit arms trade to become the second most profitable source of revenue for organized crime, after dealing in drugs.¹³⁶ Therein stands the major obstacle for most trafficking victims applying for asylum: although it is generally accepted that the Convention protects against persecution by non-state actors,¹³⁷ how can the victim show it was *for reasons of* her status—for example, as a woman—that these criminals were motivated to traffic her, and not merely in the interest of making money in the easiest, quickest way possible? This challenge is perhaps more acute for victims who have escaped their traffickers and are cooperating with authorities to prosecute them: they must be able to show that the risk they *now* face is not purely motivated by the trafficker's desire to avoid prosecution, or simply to get vengeance, but because they want to harm her for who she is.

The difficulty in establishing the nexus between the persecution and a Convention ground was exemplified in a dissenting opinion of the High Court of Australia in the now-famous *Khawar v. MIMA* case. The claimant, Naima Khawar, a woman from Pakistan who had been subjected to severe domestic abuse by her husband, and who had repeatedly sought the assistance of the government to no avail, was seeking asylum on the grounds that the refusal of the authorities to intervene against her

135. See U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 2008—COUNTRY NARRATIVES*, (2008), available at <http://www.state.gov/g/tip/rls/tiprpt/2008/105386.htm> (report on Albania noting the influence of corruption and arrests of individuals for human trafficking themselves responsible for anti-trafficking measures; report on Argentina finding that police officers own brothels and provide traffickers with protection; report on the Philippines stating that "[w]idespread corruption at all levels of the government permitted . . . traffickers, to conduct their illegal activities."); see also, *Hopes Betrayed*, *supra* note 131, at 26–33.

136. U.S. Department of Health and Human Services, *About Human Trafficking: Overview*, <http://www.acf.hhs.gov/trafficking/about/index.html> (last visited Jan. 7, 2010).

137. UNHCR Handbook, *supra* note 71, at ¶ 65.

violent husband amounted to a discriminatory lack of state protection.¹³⁸ Justice Callinan argued against her asylum claim in his dissent, stating that “the situation in which [Ms. Khawar] found herself was a situation which arose from the personal characteristics of her relationship with her husband and his family, albeit that her vulnerability as a woman in an abusive relationship may have contributed to the reluctance of the police to assist her.”¹³⁹ Fortunately for Ms. Khawar, the majority of the court agreed with her that she had in fact been persecuted because of her status as a woman,¹⁴⁰ but the decision prompted the Australian Minister for Immigration to introduce legislation narrowing Australian courts’ possible interpretation of the Refugee Convention so as to prevent applicants like Ms. Khawar from being recognized for asylum.¹⁴¹

A. Contributing Cause Approach

While it is likely that most traffickers in persons are usually acting based on an overriding economic motive, this does not preclude the possibility that a Refugee Convention ground, such as the victim’s membership in a particular social group, *also* influences their actions. Members of a particular group in a particular country, such as women or ethnic minorities, are disproportionately at risk of being trafficked because they tend to be poor and uneducated, and also because it is their gender and/or ethnicity that is in demand by customers, and thus by traffickers.¹⁴² The UNHCR and a colloquium conducted by the University of Michigan Law School [hereinafter, the “Michigan Guidelines”] have adopted what is referred to as the “contributing cause” approach to the nexus requirement of the Refugee Convention. Under this interpretation, even if a non-Convention ground, such as greed, is the persecutor’s *primary* motivating factor, the nexus requirement is met so long as a Convention ground such as the victim’s race is also a *meaningful* factor in her persecution.¹⁴³

138. *Khawar*, *supra* note 84; *see also* Hunter, *supra* note 115.

139. *Khawar*, *supra* note 84, at 47; Costello, *supra* note 11.

140. *Khawar*, *supra* note 84.

141. Hunter, *supra* note 115.

142. Catholic Relief Services, *supra* note 5 (“Disproportionately, trafficking affects poor women, children and members of disadvantaged minority groups.”); *see also* TVPA, *supra* note 29, at Sec. 102(b)(4).

143. Carmela Guerrero, Eleanor Acer & Stephanie Robinson, *Comments of the Lawyers Committee for Human Rights on INS No. 2092-00, AG Order No. 2339-2000*, at 7 (Jan. 20, 2001); James C. Hathaway, *Michigan Guidelines on Nexus to a Convention*

This development in our understanding of the Convention's nexus requirement is a crucial step forward in addressing the plight of women who face gender-related persecution, given that their persecutors tend to be private individuals whose motives may be complex. For example, a husband's motivation for abusing his wife may stem from frustration arising from unemployment or poverty, but his choice to victimize *her* may stem from her status as a woman. Nor is it required that the victim demonstrate that her traffickers were acting out of some sort of enmity or animus towards her, nor that they had any intention of inflicting harm.¹⁴⁴ This is again important because traffickers are likely motivated primarily by financial incentives.

Furthermore, even where an applicant is unable to demonstrate that someone trafficked her for reasons of a Refugee Convention ground such as her membership in a particular social group, she may still prevail by showing that the authorities in her country of origin were unwilling to protect her from her traffickers for reasons of a Convention ground.¹⁴⁵ The Refugee Convention protects individuals from persecution by non-state authorities when the state is unable or unwilling to protect the victim from those private actors. Yet to satisfy the nexus requirement, the applicant in this situation must demonstrate that the authorities were condoning or tolerating persecution against her *for reasons of* a Convention ground such as her status as a woman, and not simply due to a general lack of resources or lack of sufficient time to craft an adequate response to a societal problem.¹⁴⁶ Thus, for example, where the trafficker did not target the applicant for trafficking for any other reason than that she happened to be an easy catch, if the authorities in her country of origin failed to protect her from this harm for reasons of her status as a woman, or as a woman of a particular ethnicity or socio-economic status, the nexus requirement is met.

Ground, 23 MICH. J. INT'L L. 207, ¶ 3, at 217 (2002), available at <http://www.refugeecaselaw.org/english.pdf> [hereinafter *Michigan Guidelines*].

144. *Michigan Guidelines*, *supra* note 143, at ¶¶ 9–10.

145. UNHCR Social Group Guidelines, *supra* note 79, at ¶22 (stating that where the harm perpetrated or threatened by a non-state actor is not related to a Convention ground, the victim may still prevail on the nexus requirement by showing that the State was unwilling to protect him based on a Convention ground); *Michigan Guidelines*, *supra* note 143, at ¶ 8.

146. Guy S. Goodwin-Gill, Introductory Note to the 1951 Convention relating to the Status of Refugees, United Nations Audiovisual Library of International Law, <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>.

B. Predicament Approach

The Michigan Guidelines interpret the Refugee Convention as lacking any intent requirement altogether, on the premise that if what the drafters of the Convention sought to ensure was some kind of causal connection between the persecution and one of the Convention grounds—race, religion, nationality, political opinion, or membership in a particular social group—there are other ways of demonstrating that causal connection short of intent on the part of the trafficker or the state.¹⁴⁷ For example, it could be that neither the trafficking ring (in inflicting persecution in the form of trafficking) nor the state (in failing to protect a victim from being trafficked) *intends* to persecute the trafficking victim *for reasons of* her being a woman, and yet it is clear that she is being persecuted *because* she is a woman. As Dean Hathaway succinctly points out, “both the language and the context of the Refugee Convention make clear that the required causal nexus may be established by evidence of the reason for the threat or infliction of harm, for the withholding of state protection, or simply for the predicament faced . . .”¹⁴⁸

The Guidelines propose that in such a case as described above, being a woman is a vital element in the victim’s lack of state protection, even if her gender does not matter to the persecutor or the state, because if she were not a woman, she would not be in the predicament she is in. This “predicament” approach is in line with anti-discrimination law, in which disparate impact in the absence of intent may suffice to establish discriminatory conduct.¹⁴⁹ It also reflects the Convention’s focus, in both text and object, on the protection of refugees, as opposed to the mindset of the persecutor.¹⁵⁰

It is often clear in cases of gender-based persecution that a woman is at risk of such persecution in her country of origin because that country is plagued by severe gender discrimination that persists despite official steps to challenge it. Under the traditional line of thinking about the nexus requirement there is no way to connect that discrimination to individual acts of persecution, for example in the form of trafficking, against women, because while neither the state nor the trafficker may have mindfully targeted the victim for reasons of her gender, as a woman

147. Michigan Guidelines, *supra* note 143, at ¶ 8.

148. *Id.* at 209.

149. Shayna S. Cook, *Repairing the Legacy of INS v. Elias-Zacarias*, 23 MICH. J. INT’L L. 223, 244–45 (2002), available at <http://www.refugeecaselaw.org/cook.pdf>.

150. Michigan Guidelines, *supra* note 143, at ¶ 6; for extended discussion on the object and purpose of the Refugee Convention and how it is inconsistent with an intent requirement, see Cook, *supra* note 149, at 242–43.

she finds herself in a situation where systemic, entrenched *past* gender discrimination results in an inability of the state to protect her. Similarly, a woman who is trafficked within or from a country that has taken sincere strides toward eradicating trafficking, but which is failing miserably, will also be denied asylum, despite the fact that she faces a well-founded fear of persecution.¹⁵¹

The approach enshrined in the Michigan Guidelines looks beyond the party committing the trafficking, and beyond the state in failing to protect, to derive the nexus requirement from the predicament the trafficking victim is in which resulted in her need for surrogate protection: the element without which the victim *would have* protection. In a country with severe organized crime problems, an individual's risk of being trafficked could simply be dismissed as a context of "generalized oppression." Under this test, she can be recognized as a refugee if, were it not for her status as a woman, she would not be in the "predicament" of being at risk of trafficking. This approach provides a way for the fact that women are disproportionately (in terms of number, *and* in terms of kind) affected by the harm of trafficking to be brought into the "for reasons of" inquiry. General conditions of lawlessness in the country of origin do not preclude a claim by a trafficking victim if she, as a result of her gender, religion, or another Convention ground, faces a heightened risk as compared to the general population.¹⁵²

VI. STATE PRACTICE IN BRIEF

The spectrum of state practice among the most sought-after countries of asylum, including the United States, Australia, and European Union countries¹⁵³—which are also among the most sought after traf-

151. See, e.g., V00/11003 (2000) R.R.T.A. 929 (Austl.); N98/24000 (2000) R.R.T.A. 33 (Austl.). In both cases the Tribunal found that discrimination against women was not profound enough in the countries in question (Bosnia and Herzegovina and Colombia, respectively) to classify women as a particular social group, despite evidence in the contemporary U.S. State Department Country Reports that both societies faced serious problems of discrimination against women and trafficking in women.

152. HATHAWAY, *supra* note 14, at 93; *Michigan Guidelines*, *supra* note 143, at ¶ 17.

153. U.N. High Comm'r for Refugees Asylum Levels and Trends in Industrialized Countries (July 1, 2006), *available at* <http://www.unhcr.org/cgi-bin/texis/vtx/basics/opendoc.htm?tbl=BASICS&id=3b028097c> (last visited July 21, 2008) (noting that over half of all new asylum applications in 2006 were lodged in Europe, and that the top third and fifth refugee-hosting countries in 2006 were, respectively, Germany and the United States).

ficking destination countries¹⁵⁴—falls far short of conforming to the gender-sensitive approaches outlined above. Despite adhering in rhetoric to international standards on gender-related persecution, many jurisdictions are reluctant to explicitly affirm those standards themselves and in practice apply their own manifold interpretations of the Refugee Convention's requirements. For example, many countries continue to rule that the presence of a non-Convention reason for persecution simply cancels out a Convention reason they deem less central,¹⁵⁵ despite clear guidance from international organizations that this is inconsistent with the Convention.¹⁵⁶ Similarly, despite the Convention's focus on the victim's having been, or risking being, persecuted, as opposed to the mindset of the persecutor, countries continue to require evidence of the persecutor's attitude or motivation.¹⁵⁷

A. United States (U.S.)

In the United States it is the motive of the agent of harm that must be causally connected to the Convention ground.¹⁵⁸ Thus, unless the trafficker himself or herself is motivated by a Convention ground to persecute the trafficking victim, there is no other way to meet the nexus requirement; not even by looking to the state's motivation in failing to protect or the applicant's predicament—contrary to the position endorsed by the UNHCR.¹⁵⁹ Under the U.S. interpretation, victims fleeing trafficking for reasons of a Convention ground such as race may nonetheless be denied refugee status where they are unable to establish that at

154. JANICE G. RAYMOND AND DONNA M. HUGHES, COAL AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 23, (2001) *available at* http://www.uri.edu/artsci/wms/hughes/sex_traff_us.pdf.

155. *See, e.g.*, (1999) RRT V97/07831 (Austl.); [1999] C.R.D.D. T98-06446 (Can.), (case summary in REFLEX, 123 (Sept. 29, 1999)), *available at* http://www.irb-cisr.gc.ca/en/decisions/reflex/index_e.htm?action=issue.view&id=123.

156. UNHCR Social Group Guidelines, *supra* note 79, at ¶ 22 (stating that where the harm perpetrated or threatened by a non-state actor is not related to a Convention ground, the victim may still prevail on the nexus requirement by showing that the State was unwilling to protect him based on a Convention ground).

157. *See* Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT'L L. 265, 273 (2002).

158. *INS v. Elias-Zacarias*, 478, 483–84 (1992).

159. *See* UNHCR Social Group Guidelines, *supra* note 79, at ¶ 22 (stating that where the harm perpetrated or threatened by a non-state actor is not related to a Convention ground, the victim may still prevail on the nexus requirement by showing that the State was unwilling to protect him based on a Convention ground).

least one reason for their persecutor's actions was a Convention ground, as opposed to mere greed or vengeance.¹⁶⁰

By limiting the requisite nexus to a Convention ground to the motivation of the persecutor alone, and not the state in failing to protect from a private actor, the United States' interpretation could result in contravention of the non-refoulement obligation under the treaty, which bars the return of refugees to a country where their life or freedom could be threatened.¹⁶¹ Thus, in a 2000 ruling by the Board of Immigration Appeals (BIA), a Congolese woman was denied refugee status because the panel found that her husband had not persecuted her on account of her membership in the particular social group of Congolese women, but rather because he was a "despicable person."¹⁶² The applicant's country of origin has long been known for perhaps the most notorious and widespread sexual violence epidemic in the world, from which the state infrastructure is completely unwilling and incapable of protecting women from,¹⁶³ yet the BIA, finding the husband's act to bear no link to a Convention ground, ruled to send her back.¹⁶⁴

The United States further departs from international guidance by requiring an applicant to present "some evidence" of her persecutor's motives, whether direct or circumstantial.¹⁶⁵ This bar was raised with the REAL ID Act, passed by the U.S. Congress in 2005, which now requires asylum applicants to present "corroborating evidence" of the persecutor's motives.¹⁶⁶ Given that refugees tend to flee their countries in secretive, emergency, or conflict situations, collecting documents to ver-

160. *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (en banc) (holding that the applicant "must produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground"); *Singh v. Ilchert*, 63 F.3d 1501, 1509–10 (9th Cir. 1995) (holding that "so long as one motive [behind the persecutory conduct] is one of the statutorily enumerated grounds, the requirements have been satisfied.")

161. Refugee Convention, *supra* note 67, at art. 33.

162. *Matter of D-K-* (IJ, Elizabeth, NJ, Dec. 8 1998), as referenced in Karen Musalo & Stephen Knight, *Gender-Based Asylum: An Analysis of Recent Trends*, 77 Interpreter Releases, 1533, 1535 (2000), available at http://cgrs.uchastings.edu/documents/media/ir_10-00.pdf.

163. See, e.g., Press Release, Eur. Parliament, Sexual Violence in Congo is "The Worst in the World" (Jan. 17 2008), available at <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20080117IPR19103>.

164. *Matter of D-K-*, *supra* note 162.

165. *INS v. Elias-Zacarias*, *supra* note 158, at 483.

166. This requirement prompted one commentator to ask, "Must the asylum seeker read the mind of his or her persecutor?" Noah S. Leavitt, *The REAL ID Act: How It Violates U.S. Treaty Obligations, Insults International Law, Undermines Our Security, and Betrays Eleanor Roosevelt's Legacy*, FINDLAW, May 9, 2005, <http://writ.news.findlaw.com/leavitt/20050509.html>.

ify their claims to refugee status could be difficult, or even dangerous in cases where they fear government interception. The Ninth Circuit had previously rejected a corroborative evidence requirement, noting that:

We recognize that omitting a corroboration requirement may invite those whose lives or freedom are not threatened to manufacture evidence of specific danger. But the imposition of such a requirement would result in the deportation of many people whose lives genuinely are in jeopardy. Authentic refugees rarely are able to offer direct corroboration of specific threats.¹⁶⁷

Several U.S. circuit courts had previously affirmed that the Convention ground need not be the only reason motivating the persecutor, so if a victim could prove that her membership in a particular social group, for example, was at least *part* of the motivation behind her trafficking, the fact that her trafficker was also motivated by greed would not have been fatal to her claim.¹⁶⁸ In the case of an orphaned Honduran girl who upon reaching adulthood was attacked, abducted and sold into forced prostitution, the Board of Immigration Appeals upheld her asylum claim based on her membership in the particular social group of women forcibly prostituted, despite the existence of a concurrent reason for her fear of persecution by her traffickers, namely her successful escape from them.¹⁶⁹ The REAL ID Act went against this judicial precedent—which was already challenging for applicants to meet, given the difficulty for refugees to gather evidence¹⁷⁰—to require asylum applicants to show not only that a Convention ground was *a* reason for the persecutor's actions, but that it was a *central* reason.¹⁷¹

167. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984).

168. *Zhou v. Attorney General*, 2003 U.S. App. Lexis 25176 at *567 (9th Cir. 2003); *see also* *Yueqing Zhang v. Attorney General*, 2005 U.S. App. Lexis 22303 (2d Cir. 2005); *Muhammed Mohideen v. Attorney General*, 2005 U.S. App. Lexis 14798 (7th Cir. 2005); *Duarte Porras v. Attorney General*, 2005 U.S. App. Lexis 28396 (11th Cir. 2005).

169. *See* *Matter of F-L* (B.I.A. June 3, 2003), case summary No. 216, *available at* <http://cgrs.uchastings.edu/law/search.php>.

170. Judith L. Wood, Jesse A. Moorman, Kristina Kopina, *The REAL ID Act and Asylum*, 18th Annual American Immigration Lawyers Association, *California Chapters Conference Handbook*, 166 (2005), *available at* <http://www.wood-moorman.com/files-from-client/Wood-Moorman%20!!!REAL%20ID%20&%20Asylum%20%5Breprint%205D.pdf>.

171. The U.S. statute implementing the Refugee Convention replaced the original treaty's words "for reasons of" with "on account of," which could be argued to put more emphasis on the personal motive of the agent of harm.

B. United Kingdom (U.K.)

Consistent with the UNHCR Trafficking Guidelines, and a year before issuing its own gender guidelines,¹⁷² the United Kingdom House of Lords held in *Shah and Islam v. SSHD* that if a Refugee Convention ground motivates *either* the party inflicting the serious harm, or the state in failing to protect from that harm, the persecution qualifies as having been carried out “for reasons of” a Convention ground.¹⁷³ In the *Shah* case, it was clear that the applicants had been denied protection from domestic violence by the state authorities because they belonged to the particular social group of women in Pakistan. Despite finding that the applicants had not demonstrated that their persecution by their husbands was for reasons of their gender, the state’s institutionalized discriminatory treatment of women—which resulted in their lack of protection—satisfied the nexus requirement.

However, this approach still requires intent, on the part of either the agent of harm or the state,¹⁷⁴ which, as noted above, might lead to denial of refugee status to victims of trafficking despite the fact that they find themselves in their predicament by reason of their membership in a particular social group. In *Omoruyi* a man who refused to join a cult due to his religious beliefs, and fearing persecution from cult members, was denied refugee status on the ground that the cult had demonstrated no intent to harm him for reasons of his religious beliefs, but rather that any persecution faced was due to his refusal to comply with the cult’s demands. Thus, although the applicant clearly was in the predicament of facing persecution from this cult because of religious differences, the court found that he did not establish that those religious beliefs motivated the intent of the cult to persecute him.¹⁷⁵

British jurisprudence also has applied the requirement that the Convention ground be the primary motivating factor for the persecution necessitating international protection, contrary to the position of UNHCR and the Michigan Guidelines.¹⁷⁶

A potential limitation of the *Shah and Islam* case in the context of asylum claims by trafficking victims is that the court heavily emphasized the degree of systemic and severe bias against women by the Pakistani authorities, referring to the “evidence of institutionalised discrimination

172. The UK issued its own gender guidelines in 2000. *See supra* note 113.

173. *Regina v. Immigration Appeal Tribunal, Ex parte Shah*, [1999] W.L.R. 1015 (Eng.).

174. *Omoruyi v. Sec’y of State for the Home Dep’t*, [2001] Imm. A.R. 175 (Eng.).

175. *Omoruyi*, Imm. A.R. at 174.

176. *K & anr v. Sec’y of State for the Home Dept.* [2004] EWCA (Civ)C4/2003/2520, [18]-[20] (Eng.).

against women by the police, the courts and the legal system.”¹⁷⁷ As discussed above, in societies where a government may be taking sincere strides to address trafficking that disproportionately targets women, the nexus requirement might not be met under *Shah* where the state’s failure to protect is not selective or discriminatory, though the victim is nonetheless in the predicament she is in for reasons of being a woman.

However, a recent U.K. court decision, *Moldova*, allowing an appeal of a trafficked woman denied refugee status,¹⁷⁸ rejected case precedent explicitly holding that “people who have been trafficked” do not form a particular social group under the meaning of the Refugee Convention.¹⁷⁹ The judge in *Moldova* recognized that the victim in the case had been “trafficked because she is a woman,” living in a country with severe trafficking problems.¹⁸⁰ The decision implicitly adopted the Michigan Guidelines predicament approach, granting her appeal on the basis of her gender *despite* the broad nature of her particular social group (women in Moldova) *and* despite the fact that her country of origin exhibited general conditions of lawlessness rather than state-sanctioned discrimination against women by law enforcement.

Many governments apply an “independent flight alternative” exception to refugee status, where a claimant who otherwise meets the criteria for refugee status will nonetheless be denied asylum if she is deemed to have the option of relocating to a safe area *within* her country of origin.¹⁸¹ This option can pose problems for women in general, who in many countries “may not be able to integrate into society without male relatives or have access to employment, accommodation, etc.”¹⁸² In recognition of this reality, a court in the United Kingdom recently held that the internal flight alternative could not be applied in a case where the applicant would face a “life of prostitution” if returned to her home country.¹⁸³ The decision is striking in that it acknowledges the harms

177. Shaw & Islam, 2 W.L.R. at 1036.

178. SB (PSG – Protection Regulations – Reg 6) *Moldova v. Sec’y of State for Home Dep’t*, [2008] UKAIT 00002 ¶ 14.

179. SB, UKAIT 00002 at ¶ 16.

180. SB (*Moldova*) v. Sec’y of State for the Home Dept., [2008] UKAIT 00002, [14] (Eng.).

181. See UNHCR *Guidelines on International Protection: Internal Flight or Relocation Alternative within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, ¶¶ 2–3, HCR/GIP/03/04 (July 23, 2003), available at <http://www.unhcr.org/publ/PUBL/3f28d5cd4.pdf> (noting that although the internal flight alternative is not a specific requirement of the Refugee Convention, it has been read into the Convention by many governments).

182. Asylum Aid, *supra* note 113, at 8.

183. AA (Uganda) Sec’y of State for the Home Office [2008] EWCA (Civ 579, [17] (Eng.); see also “Significant Legal Case: AA (Uganda) v Sec’y of State for the Home

inherent in conditions of prostitution, and affirms that a woman whose only alternative is to turn to prostitution for a living is neither safe, nor fully assured of her human rights.

C. Australia

Australia followed the U.K.'s *Shah* approach in the High Court's *Khawar* judgment, in which it was held that the causal connection to a Convention ground may be made either to a non-state agent of persecution *or* to the state in failing to protect.¹⁸⁴ In so finding, Justice Kirby referred to the long history of failures by states to protect their citizens as the precursor for such great attention by international law on human rights matters.¹⁸⁵ He pointed out that too much focus on what was in the mind of the persecutor takes away from a proper examination of the effect of the persecution on the victim, which is at the heart of the Convention.¹⁸⁶ Perhaps Ms. Khawar's husband was not specifically thinking, during his attacks on her, that he wanted to harm her because she was a woman, yet it is clear that she suffered persecution, and that the state did not protect her, because she is a woman.

However, the *Khawar* court, like the UK court in *Shah*, focused on the severe and institutional nature of the state's discrimination against women in deriving the nexus from the state's failure to protect, as distinguished from unintentional inability to protect. Thus, victims originating from states described in international reports as making sincere efforts to curb trafficking may not be able to prevail against the "symbolic willingness of a state to eradicate trafficking."¹⁸⁷

Australian courts have also applied the "contributing causes" approach under which the Convention reason need not be the only or primary reason for the persecution.¹⁸⁸ That country's legislation implementing the Convention, however, requires that an enumerated ground

Office [2008], WOMEN'S ASYLUM NEWS, (Asylum Aid/Refugee Women's Resource Project, London, U.K.), June-July 2008, Issue 76, pp. 3-5, http://www.asylumaid.org.uk/data/files/publications/82/Issue_No._76_June_July_2008_pdf_final.pdf.

184. *Khawar*, 210 C.L.R. at 25.

185. *Khawar*, 210 C.L.R. at 25.

186. *Khawar*, 210 C.L.R. at 27-28.

187. Dorevitch & Foster, *supra* note 51, at 37.

188. See Minister for Immigration & Multicultural Affairs v. Abdi, (1999) 87 F.C.R. 105, 112 (Austl.); Minister for Immigration & Multicultural Affairs v. Sarrazola, (1999) 166 A.L.R. 641, 645-46 (Austl.); Chokov v. Minister for Immigration & Multicultural Affairs, (1999) F.C.A. 823 ¶¶ 29, 32 (Austl.).

be “the essential and significant reason” for the persecution,¹⁸⁹ in conflict with the Michigan Guidelines’ approach.¹⁹⁰ In a case involving a woman trafficked for sexual slavery from Thailand, an Australian court reaffirmed the statutory requirement of the “essential and significant reason,” and in fact rhetorically strengthened it by prefacing the phrase with “at least.” But the court then went on to hold that while the claimant’s traffickers were motivated by her outstanding debt and testimony against them, this did not preclude the possibility that her membership in a particular social group provided a significant and essential motivation *as well*.¹⁹¹ Australian courts have, consistent with the Michigan Guidelines, rejected the animus requirement, noting that “[p]ersecution may be carried off coolly, efficiently, and with no element of personal animus.”¹⁹²

D. Canada

Canadian jurisprudence also has held the nexus requirement to be satisfiable either through the motivation of the agent of harm, or through that of the state in its refusal to protect from a non-state agent of harm.¹⁹³ The *Ward* decision by Canada’s high court ruled that “state complicity in persecution is not a pre-requisite to a valid refugee claim,” citing both Canadian and international influences for the holding.¹⁹⁴ Justice LaForest explained that the basis for the international refugee law regime is “not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution . . . The state’s inability to protect the individual from persecution founded on one of the enumerated grounds constitutes failure of local protection.”¹⁹⁵

It also established in Canadian jurisprudence that the Convention ground need not be the *only* motivation influencing the agent of persecution.¹⁹⁶ However, in practice courts have ruled that where there is an

189. Australian Migration Act (1958), § 91R(1)(a).

190. Michigan Guidelines, *supra* note 143, at ¶ 13.

191. *Vxaj v. Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 198 F.L.R. 455, 460 (Austl.).

192. *Chen Shi Hai v. Minister for Immigration and Multicultural* (2000) 201 C.L.R. 293, 304 (Austl.).

193. *Ward v. Canada*, [1993] 2 S.C.R. 689 (Can.).

194. *Ward* 2 S.C.R. at ¶ 33.

195. *Ward* 2 S.C.R. at ¶ 40.

196. *Zhu v. Canada* (Minister of Employment & Immigration), [1994] CarswellNat 1600, (per MacGuigan, J.) (“[I]t is enough for the existence of political motivation that one of the motives was political.”).

obvious economic motive, any Convention reason is drowned out. In the case of a single Thai woman who had been trafficked into sexual servitude, the Immigration and Refugee Board found that the trafficker's motive was based entirely on the victim's debt bond.¹⁹⁷ In another case involving a Thai trafficking victim who had escaped one trafficking ring only to be abducted by another, the Board denied asylum on the ground the victim's fear stemmed from her own actions of prostituting herself to pay off her debt bond to the second group of traffickers, rather than her membership in the social group of educated women.¹⁹⁸ In the case of an Ethiopian woman sold into forced domestic labor in Lebanon, however, the Refugee Protection Division accepted that the victim's status as a past trafficking victim satisfied the nexus requirement, stating that it had referred directly to Canada's gender guidelines.¹⁹⁹

E. European Union (E.U.)

The European Union, in contrast to the common law countries discussed above, has been found by UNHCR to have made very slow progress in gender-mainstreaming its refugee policies.²⁰⁰ Unlike Canada and the U.S., which adopted gender guidelines pursuant to UNHCR's recommendation within a few years of its issuance, not a single European country had officially adopted UNHCR's gender guidelines into legislation or policy directives as of 2004.²⁰¹ Strikingly, fourteen out of forty-one European countries surveyed by UNHCR, including Portugal, Germany, and Switzerland, did not recognize non-state persecution for the purpose of asylum, although "the gendered nature of women's relationship with the state—which is likely in many contexts to be less

197. CRDD No. T98-06446 (Immigr. And Refugee Bd., Sept. 29, 1999) (Can.).

198. CRDD No. T99-01434 C.R.D.D. T99-01434 (Can.) Case summary in 125 RefLex (Oct. 27, 1999), *available at* http://www2.irb-cisr.gc.ca/en/decisions/reflex/index_e.htm?action=issue.view&id=125).

199. RPD TA4-16915 (Can. Ref. Prot. Div. March 16, 2006), case summary in RefLex, Issue 287 (June 8, 2006), *available at* http://www.irb-cisr.gc.ca/en/decisions/reflex/index_e.htm?action=issue.view&id=287.

200. U.N. High Comm'r for Refugees [UNHCR], Evaluation and Policy Analysis Unit, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, EPAU/2004/05, ¶¶ 654–55, at 137–38, Doc. EPAU/2004/05 (May 2004) (prepared by Heaven Crawley & Trine Lester), *available at* <http://www.jrseurope.org/accompanydetainees/docs/Crawley%20Report%20on%20EU%20Gender%20and%20Asylum.pdf>; *see also* Rodger Haines, "The importance of mainstreaming refugee claims by women, UNHCR DISCUSSION PAPER, (No. 1/2005) at 9, (2005), *available at* <http://www.unhcr.org.au/pdfs/webdiscussionpaperjan05.pdf>.

201. Crawley & Lester, *supra* note 200, at ¶ 82.

direct then that of men—[means that] this trend has a disproportionate impact on gender-related asylum claims.”²⁰²

In its directive proposing common standards for refugee determination across member countries, the European Union has opened the door—or cracked it open slightly—to recognizing non-state persecution, such as that of human traffickers; in addition to the state, the directive includes among the list of agents of persecution non-state actors. However, this clause is qualified that non-state persecution is recognized only “if it can be demonstrated that the [state or parties controlling the state or part of the state], *including international organisations*, are unable or unwilling to provide protection against persecution or serious harm” (emphasis added).²⁰³ Amnesty International has criticized the EU’s broad approach to which kind of entity can provide a person with protection, noting that “areas under the authority of State-like bodies are rarely secure . . . these organizations often do not have the necessary means to prevent human rights violations . . .” By shifting the responsibility to provide surrogate protection, undertaken by a state upon accession to the Refugee Convention,²⁰⁴ to entities with dubious ability to provide protection, the EU puts refugees at serious risk of *refoulement*.

The EU’s directive adopts a less intent-based approach to the issue of motivation for the persecution than the U.S.; it does not reference the intent of the persecutor, nor the state, but rather requires that “there must be a connection between the reasons mentioned in Article 10 and the acts of persecution.”²⁰⁵ While not going so far as to adopt the predicament approach, the EU directive looks beyond the individual’s intent to the persecutory conduct itself. The requirement of a “connection” also appears to allow for a contributing cause approach, where the Convention ground need not be the only motivating factor for the persecution.²⁰⁶

In a recent instrument the E.U. recognized that trafficking victims are entitled to apply for asylum in their country of “destination,”²⁰⁷ but it remains to be seen what effect the directive will bear on the asylum

202. *Id.* at ¶ 242.

203. Council Directive 2004/83/EC art. 6(b)–(c), 2004 O.J. (L 304) 12, 16 (EU) *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>.

204. *See Ward v. Canada*, [1993] 2 S.C.R. 689, ¶ 40 (Can.) (LaForest noting that “[t]he international community was meant to be a forum of second resort for the persecuted, a ‘surrogate’, approachable upon failure of local protection.”).

205. Council Directive 2004/83/EC art. 9.3. 2004 O.J. (L 304) 12, 17 (EU).

206. *Id.*

207. *Brussels Declaration supra* note 59, § 13.

practices of individual member countries, which until now have failed to address the asylum needs of trafficking victims. As of 2005, refugee status was granted “in only a limited number of cases involving forced prostitution or sexual exploitation,” and less than half of the European countries surveyed recognized sexual violence as a form of persecution.²⁰⁸

CONCLUSION

Trafficking is such a fast-growing human rights concern that it was the focus of the 2006 United Nations “State of the World” report.²⁰⁹ Yet instruments created to address trafficking, including the Palermo Protocol, primarily serve law enforcement goals, without sufficient provision for long-term protection of the victims.²¹⁰ Trafficked persons, who are overwhelmingly women and girls, may be in need of the surrogate protection of a country of refuge, but will likely be denied because their gender-specific persecution is not consistently recognized in practice by most states. In those instances where it is, they will have difficulty demonstrating that their persecution was on account of a Convention ground, due to the interpretation of the “nexus” requirement by the top refugee status determination tribunals. Until the world’s governments acknowledge the gravity and prevalence of gender-based persecution, and systematically accept gender *in itself* as a basis for refugee status, trafficked women and girls will continue to be denied meaningful protection from this growing form of exploitation. ♣

208. See Haines, *supra* note 200, at 9.

209. U.N. Population Fund, *State of the World Population 2006*, 44 (2006), http://www.unfpa.org/swp/2006/pdf/en_sowp06.pdf.

210. See generally Palermo Protocol, *supra* note 2.